Appendix A
Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1333, 1489, 1334, 1326, 2335, 1490 - August Term, 1992

(Argued April 19, 1993 Decided June 9, 1993)

Docket Nos. 92-1334, 92-1349, 92-1356,
92-1357, 92-1380 and 92-1381

Filed: June 9, 1993

UNITED STATES OF AMERICA,

Appellee,

-against-

JEFFREY P. SANTOPIETRO, THOMAS E. PORZIO,

Defendants,

PAUL R. VITARELLI, JOSEPH J. SANTOPIETRO,
ROBERT A. GIACOMI, FRED L. GIUSTI and
JACK R. GIACOMI, and PERRY A. PISCIOTTI,

Defendants-Appellants.

Before:

PRATT and JACOBS, *Circuit Judges,* and
KNAPP, *District Judge*[*]

---

[*] Hon. Whitman Knapp, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Appendix A
Opinion of the United States Court of Appeals

Joseph J. Santopietro, Perry A. Pisciotti, Paul R. Vitarelli, Robert A. Giacomi, Jack R. Giacomi, and Fred L. Giusti appeal from judgments of conviction entered in the United States District Court for the District of Connecticut, T.F. Gilroy Daly, *Judge.* Defendants raise numerous challenges to their convictions and sentences.

All convictions affirmed; all sentences affirmed except Robert Giacomi's, which is vacated and remanded for resentencing.

JUDD BURSTEIN, New York, New York (Gerald L. Shargel, New York, New York, of Counsel), *for Defendants-Appellants Pisciotti & Santopietro.*

PATRICK TOMASIEWICZ, West Hartford, Connecticut (Fazzano & Tomasiewicz, of Counsel), *for Defendant-Appellant Vitarelli.*

DAVID A. MORAGHAN, Torrington, Connecticut, *for Defendant-Appellant Jack R. Giacomi.*

RICHARD S. CRAMER, Wethersfield, Connecticut, *for Defendant-Appellant Robert A. Giacomi.*

JULES SACH, New York, New York, *for Defendant-Appellant Giusti.*

Appendix A
Opinion of the United States Court of Appeals

HOLLY B. FITZSIMMONS, Assistant United States Attorney for the District of Connecticut (Albert S. Dabrowski, United States Attorney, Amy B. Lederer, Assistant United States Attorney, of Counsel), *for Appellee.*

PRATT, *Circuit Judge:*

FACTS AND BACKGROUND

Joseph J. Santopietro became the mayor of Waterbury, Connecticut, in November 1985. His victory was due in part to a feud between factions of the city's Democratic party, which had been in power for the previous ten years. The Republicans' uncertainty that they would be able to retain the power they had won fueled a "get it while we can" mentality among Santopietro and his close associates. Perry Pisciotti, a former GOP town chairman who was close to Santopietro's family, arranged for Santopietro to use his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen. Santopietro was reelected twice, and the conspiracy expanded in 1988 to include other Waterbury politicians.

Benefits to certain bankers and land developers included zoning changes, subdivision approvals, confidential appraisal information for use in bidding on city-owned property, expedited treatment from city agencies, and input into appointments. In return, Santopietro and other members of his administration received hundreds of thousands of dollars disguised as loans, sales of options, real estate contract cancellations, and property leases.

Following a five-week trial before T.F. Gilroy Daly, *Judge,* in the United States District Court for the District of

Connecticut, a jury found seven defendants guilty of conspiracy, bribery, and various counts of bank fraud, embezzlement, and tax evasion. Six of them have appealed.

Santopietro was convicted of bribery conspiracies, *see* 18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); bank fraud, *see* 18 U.S.C. § 1344; embezzlement of federal grant monies, *see* 18 U.S.C. § 665(a); and tax evasion, *see* 26 U.S.C. § 7201. He was sentenced to 108 months' imprisonment, three years' supervised release, a $25,000 fine, and a $900 special assessment.

Pisciotti was convicted of conspiracy, *see* 18 U.S.C. § 371; bribery, *see* 18 U.S.C. § 666(a)(2); and bank fraud, *see* 18 U.S.C. § 1344. He was sentenced to 114 months' imprisonment, three years' supervised release, a $25,000 fine, and a $250 special assessment.

Paul Vitarelli, former president of Waterbury's Board of Aldermen, was convicted of conspiracy, *see* 18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, *see* 26 U.S.C. § 7206(1). He was sentenced to forty-one months' imprisonment, three years' supervised release, and a $150 special assessment.

Robert Giacomi, former majority leader of Waterbury's Board of Aldermen, was convicted of conspiracy, *see* 18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, *see* 26 U.S.C. § 7206(1). He was sentenced to fifty-one months' imprisonment, three years' supervised release, a $7500 fine, and a $150 special assessment.

Jack Giacomi, Waterbury's labor negotiator and brother of Robert Giacomi, was convicted of conspiracy, *see*

18 U.S.C. § 371; receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, *see* 26 U.S.C. § 7206(1). He was sentenced to eighteen months' imprisonment, three years' supervised release, a $4000 fine, and a $150 special assessment.

Fred Giusti, former majority leader of Waterbury's Board of Aldermen, was convicted of conspiracy, *see* 18 U.S.C. § 371; and receiving corrupt payments, *see* 18 U.S.C. § 666(a)(1)(B). He was sentenced to thirty-three months' imprisonment, three years' supervised release, and a $100 special assessment.

The defendants raise numerous issues on appeal, challenging various aspects of their trial and sentences. We have carefully considered all of the challenges to their convictions and concluded that none of them has any merit. We would affirm all of the judgments by summary order but for the existence of two sentencing issues that deserve brief comment: first, the imposition of a special skills enhancement to Robert Giacomi's sentence pursuant to U.S.S.G. § 3B1.3; second, the sentencing of Fred Giusti, who claims he received a "reward" rather than a "bribe", pursuant to U.S.S.G. § 2C1.1. For the reasons set forth below, we affirm all of the judgments except that with respect to Robert Giacomi we affirm the conviction but remand for resentencing.

DISCUSSION

A. Application of a Special Skills Enhancement to Robert Giacomi.

Robert Giacomi is a certified public accountant. The probation department's presentence report did not recommend

any adjustments that would reflect this fact. The government, however, objected to this omission and argued that Robert Giacomi had used his special accounting skills to prepare false tax returns for himself, Santopietro, and Jack Giacomi. The government urged the court to impose a two-level adjustment under § 3B1.3, "Abuse of Position of Trust or Use of Special Skill", which it did, increasing Giacomi's offense level from 20 to 22.

The § 3B1.3 enhancement was applied to Giacomi's sentence for the substantive bribery conviction, not to his sentence for filing a false tax return. His sentence for the bribery conviction was determined under § 2C1.1 -- "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right." Application note 3 to § 2C1.1 provides: "Do not apply §3B1.3 * * * except where the offense level is determined under §2C1.1(c)(1), (2), or (3). In such cases, an adjustment from §3B1.3 * * * may apply."

Application note 3 is part of the commentary that explains and interprets how the guideline is to be applied and, as such, is binding on the courts. *Stinson v. United States*, 61 U.S.L.W. 4447 (1993) (commentary that interprets or explains guideline is authoritative); *see also* U.S.S.G. § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal."). Since the application note expressly prohibits the imposition of a § 3B1.3 enhancement to a sentence under § 2C1.1 unless the offense level is determined under one of the enumerated exceptions, and since Robert Giacomi's offense level was not determined under any of the exceptions, the sentencing court erred in applying the § 3B1.3 enhancement. Therefore, we must vacate the sentence and remand for resentencing.

Appendix A
Opinion of the United States Court of Appeals

We note in passing that in pronouncing Robert Giacomi's sentence orally, Judge Daly mentioned only one sentence, without differentiating between the three counts of conviction. This practice is consistent with the sentencing guidelines, which direct the court to determine an adjusted combined offense level applicable to all counts and impose one sentence as the total punishment. *See* U.S.S.G. § 3D1.1 ("Procedure for Determining Offense Level on Multiple Counts"); U.S.S.G. § 3D1.5 ("Determining the Total Punishment"); U.S.S.G. § 5G1.2 ("Sentencing on Multiple Counts of Conviction"). However, where the maximum allowable sentence on one of the component counts is less than the guideline sentence imposed, the statutory maximum is the guideline sentence for that count of conviction. U.S.S.G. § 5G1.2(b) (incorporating by reference § 5G1.1(a)). Following these directions, Judge Daly, in preparing the written judgment and commitment order for Giacomi, indicated fifty-one months, the result of his guideline calculation, as the sentence on counts one and two, and thirty-six months, the statutory maximum, for Giacomi's third count of conviction, filing a false tax return. *See* 26 U.S.C. § 7206(1). While it would have been better, given the effect of a statutory maximum on one of the counts, to refer specifically to each count at the sentencing hearing, we would not require a resentencing merely because the court failed to do so. In this case, however, since we are already remanding for resentencing because of the application of the § 3B1.3 enhancement, Judge Daly can avoid any further problems by specifying at the resentencing proceeding the specific jail term being imposed on each count.

B. Failure to Differentiate Between a Bribe and a Reward.

Appendix A
Opinion of the United States Court of Appeals

Fred Giusti argues that there is a "hole" in the sentencing guidelines because he was convicted of receiving a "reward" under 18 U.S.C. § 666(a)(1)(B), but the applicable guideline, U.S.S.G. § 2C1.1, covers only "bribes". He claims that the trial court erred by failing to determine whether he received a bribe or a reward and sentence him accordingly. In response, the government argues that Giusti's characterization of the payments to him as "rewards" is incorrect, that any corrupt payment received in violation of 18 U.S.C. § 666 is a "bribe", and that the applicable guideline for § 666 offenses was correctly determined by the district court to be § 2C1.1.

Giusti argues that he was convicted for receiving a reward for past actions, not for receiving a bribe. While 18 U.S.C. § 666 is entitled "Theft or bribery concerning programs receiving Federal funds", the statute itself criminalizes "corruptly * * * accept[ing] * * * anything of value * * * intending to be influenced or rewarded * * * in connection with any * * * transaction" of a local government official. 18 U.S.C. § 666 (a)(1)(B). The indictment and the jury charge both tracked the language of the statute, including the language "intending to be influenced or rewarded", without differentiating between being "influenced" and being "rewarded". Giusti does not dispute the validity of the indictment or of the jury charge.

For all practical purposes, the difference between influencing and rewarding official action is one of timing. To influence, the payment is made before the official action; to reward, the payment is made afterwards. The evidence at trial revealed that Giusti was a member of Waterbury's Board of Aldermen from January 1, 1986, to February 9, 1989, and that he received corrupt payments from July 5, 1988, to October 5, 1988. Since the time during which he received corrupt

payments fell within his term in office, it is not clear that he received the payments only as a reward for past actions. Indeed, on this record a factfinder could reasonably infer that the payments were bribes, or rewards, or both. Therefore, on a factual level the evidence does not compel Giusti's assertion that he was the recipient of rewards rather than bribes.

Even if the payments Giusti received were in fact rewards made for past actions rather than bribes to influence future actions, he was correctly sentenced under § 2C1.1, entitled "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right". Giusti argues that § 2C1.1 covers only bribes, because it does not refer to rewards or gratuities and that § 2C1.2, entitled "Offering, Giving, Soliciting, or Receiving a Gratuity", should apply to him. The statutory index of the sentencing guidelines, which specifies which guideline applies to which crime, lists both § 2C1.1 and § 2C1.2 as applicable guidelines for 18 U.S.C. § 666(a)(1)(B) offenses. However, guideline § 2C1.2, which covers gratuities, does not include a corrupt purpose as an element of the offense. *See* U.S.S.G. § 2C1.2, comment. (background). Since a corrupt purpose was an essential element of Giusti's conviction under 18 U.S.C. § 666, *cf. United States v. Crozier*, 987 F.2d 893 (2d Cir. 1993) (rejecting claim that former § 666(c) was bribery-only statute; court's failure to distinguish between bribe and gratuity inconsequential since it clearly instructed jury on mens rea), sentencing pursuant to § 2C1.2 would be inappropriate, leaving § 2C1.1 as the only applicable guideline.

Section 2C1.1's failure to refer to "rewards" does not mean there is a "hole" in the guidelines. Not every criminal statute has a guideline that mirrors its language; the statutory index simply "specifies the guidelines section * * * ordinarily

applicable to the statute of conviction." U.S.S.G. App. A, intro. The first circuit recently confronted a similar issue in *United States v. Mariano*, 983 F.2d 1150, 1158-60 (1st Cir. 1993). There, the defendants claimed that they had given a gratuity, rather than a bribe, to a municipal official in violation of 18 U.S.C. § 666(a)(2), and should be sentenced under the gratuity guideline, § 2C1.2. The district court rejected their argument and sentenced them under the bribery guideline, § 2C1.1. The first circuit upheld the district court's choice of guideline, because the offenses to which the defendants pled guilty "involved corrupt intent"; therefore, "the determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous." *Mariano*, 983 F.2d at 1159.

Giusti argues not that he was improperly convicted under 18 U.S.C. § 666, only that he was improperly sentenced. Because the jury's verdict establishes that Giusti had a corrupt intent, his actions are more akin to bribe-receiving than to gift-receiving. As we view it, the crucial factor in this case is the corrupt purpose, not the timing of the payment. Therefore, sentencing Giusti under the bribery guideline was not clearly erroneous.

CONCLUSION

Because the district court improperly applied a two-level enhancement under § 3B1.3 to Robert Giacomi, we vacate his sentence and remand for resentencing; his conviction, however, is affirmed. The judgments against Santopietro, Pisciotti, Vitarelli, Jack Giacomi, and Giusti are affirmed.

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-three.

FILED: July 29, 1993

Docket Nos. 92-1334 (L) and 92-1349, 1381

UNITED STATES OF AMERICA,
Appellee,

v.

JEFFREY P. SANTOPIETRO, THOMAS E. PORZIO,
Defendants,

PAUL R. VITARELLI, JOSEPH J. SANTOPIETRO, ROBERT A. GIACOMI, FRED L. GIUSTI and JACK R. GIACOMI, and PERRY A. PISCIOTTI,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants Joseph Santopietro and Perry Pisciotti,

Appendix B
Order of United States Court of Appeals
On Petition for Rehearing and Suggestion for
Rehearing In Banc

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Appendix C
Constitutional and Statutory Provisions

U.S. CONST. amend. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 371 states:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 665 states:

(a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency or organization receiving financial assistance or any funds under the Comprehensive Employment and Training Act or the Job Training Partnership Act knowingly enrolls an ineligible participant, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a financial assistance agreement or contract pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than 2 years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than 1 year, or both.

(b) Whoever, by threat or procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a financial assistance agreement or contract under the Comprehensive Employment and Training Act or the Job Training Partnership Act induces any person to give up any money or thing of any value to any person (including such organization

or agency receiving funds) shall be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(c) Whoever willfully obstructs or impedes or willfully endeavors to obstruct or impede, an investigation or inquiry under the Comprehensive Employment and Training Act or the Job Training Partnership Act, or the regulations thereunder, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 1 year, or by both such fine and imprisonment.

18 U.S.C. § 666 states:

(a) Whoever, if the circumstances described in subsection (b) of this section exists--

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof--

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that--

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or

rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section--

(1) the term "agent" means a person authorized to act on behalf of another person or a

government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State; and

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(4) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time for both before and after the commission of the offense.

Appendix C
Constitutional and Statutory Provisions

18 U.S.C. § 872 states:

> Whoever, being an officer, or employee of the United States or any department or agency thereof, or representing himself to be or assuming to act as such, under color or pretense of office or employment commits or attempts an act of extortion, shall be fined not more than $5,000 or imprisoned not more than three years, or both; but if the amount so extorted or demanded does not exceed $100, he shall be fined not more than $500 or imprisoned not more than one year, or both.

18 U.S.C. § 1344 states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1951 states:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any

article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between

> points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.
>
> (c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S.C. § 3231 states:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

26 U.S.C. § 7201 states:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Appendix C
Constitutional and Statutory Provisions

28 U.S.C. § 1254 (1) states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

U.S.S.G. § 2C1.1 states:

(a) Base Offense Level: 10

(b) Specific Offense Characteristics

(1) If the offense involved more than one bribe or extortion, increase by 2 levels.

(2) (If more than one applies, use the greater):

(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest, exceeded $2,000, increase by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit).

(B) If the offense involved a payment for the purpose of influencing an elected official or any official holding a high level decision-making or sensitive position, increase by 8 levels.

Appendix C
Constitutional and Statutory Provisions

(c) Cross References

(1) If the offense was committed for the purpose of facilitating the commission of another criminal offense, apply the offense guideline applicable to a conspiracy to commit that other offense if the resulting offense level is greater than that determined above.

(2) If the offense was committed for the purpose of concealing, or obstructing justice in respect to, another criminal offense, apply §2X3.1 (Accessory After the Fact) or §2J1.2 (Obstruction of Justice), as appropriate, in respect to that other offense if the resulting offense level is greater than that determined above.

(3) If the offense involved a threat of physical injury or property destruction, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage) if the resulting offense level is greater than that determined above.

(d) Special Instruction for Fines - Organizations

(1) In lieu of pecuniary loss under subsection (a)(3) of §8C2.4 (Base Fine), use the greatest of: (A) the value of the unlawful payment; (B) the value of the benefit received or to be received in return for the

> unlawful payment; or (C) the consequential damages resulting from the unlawful payment.

U.S.S.G. § 2C1.1, Application Note 5 states:

> Where the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted. *See* Chapter Five, Part K (Departures).

U.S.S.G. § 3C1.1 states:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

U.S.S.G. § 3C1.1, Application Note 3(d) states:

> The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:
>
> (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (*e.g.*, shredding a document or destroying

> ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (*e.g.*, attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender....

U.S.S.G. § 5K2.0 states:

> Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may

involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, §5K2.7, would have to be quite serious to warrant departure from the guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal

with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.

U.S.S.G. § 5K2.7 states:

If the defendant's conduct resulted in a significant disruption of a governmental function, the court may increase the sentence above the authorized guideline range to reflect the nature and extent of the disruption and the importance of the governmental function affected. Departure from the guidelines ordinarily would not be justified when the offense of conviction is an offense such as bribery or obstruction of justice; in such cases interference with a governmental function is inherent in the offense, and unless the circumstances are unusual the guidelines will reflect the appropriate punishment for such interference.

U.S.S.G. § 6A1.3 Commentary states:

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal

fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy." *United States v. Marshall*, 519 F.Supp. 751 (D.C. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978).

Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.

SUP. CT. R. 12.2 states:

2. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party who is not shown on the petition for a writ of certiorari to have joined therein at the time the petition is filed with the Clerk may not thereafter join in that petition. When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. A petition for a

Appendix C
Constitutional and Statutory Provisions

writ of certiorari shall not be joined with any other pleading.

SUP. CT. R. 14.1 (f) states:

> (f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in subparagraph .1(k) of this Rule.